

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSE RONDON

Claimant

VS.

TYSON FRESH MEATS, INC.

Self-Insured Respondent

Docket Nos. 1,011,515 &
1,018,095

ORDER

Claimant requested review of the October 11, 2006 Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on January 9, 2007.

APPEARANCES

Stanley R. Ausemus, of Emporia, Kansas, appeared for the claimant. Gregory D. Worth, of Roeland Park, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) adopted the assessment of Dr. Dick Geis and found that claimant had a functional impairment of 30 percent to the body as a whole. The ALJ noted, however, that K.S.A. 44-510d(22) limits compensation for a traumatic hernia to medical care and temporary total payments. The ALJ found that claimant's impairment was from the hernia injuries and is not due to nerve injuries related to the hernias. Accordingly, the ALJ denied additional compensation. The ALJ found that claimant is entitled to future medical care upon application and review and unauthorized medical care up to the applicable statutory limit. The ALJ also found that claimant reached maximum medical improvement (MMI) on November 4, 2004, and that any temporary total disability benefits provided by respondent after that time should be reimbursed by the Kansas Workers Compensation Fund.

Claimant argues that he suffered a new and distinct injury not anticipated by the Workers Compensation Act. Claimant contends he submitted to surgeries to repair his hernia as mentioned in K.S.A. 44-510d(22) and, as a result of the failed hernia surgeries, is now unemployable. Claimant asserts he is entitled to a functional disability of 30 percent to the body as a whole and a work disability of 80 percent, based on an average of a 100 percent wage loss and a task loss of 60 percent.

Respondent argues that claimant is not entitled to permanent partial disability benefits because his only injuries were two hernias, which do not entitle him to permanent partial disability benefits under the Workers Compensation Act. In the event the Board determines that claimant does have a condition for which he is entitled to receive permanent partial disability benefits, respondent argues that claimant should be limited to a 3 percent whole person impairment rating because his hypogastric nerve condition would be the only injury entitling him to permanent partial disability benefits. Respondent also argues that claimant is not eligible for work disability because he failed to make a good-faith effort to find work following his termination by respondent. If a post-injury wage is imputed to claimant, respondent argues that claimant is capable of earning up to \$320 a week, which computes to a 30 percent wage loss in this case. Respondent also asserts that claimant should be limited to a task loss of 60.3 percent, which, when averaged with the 30 percent wage loss, would compute to a work disability of 45.15 percent. Also in the event the Board finds that claimant is entitled to permanent partial disability compensation, respondent argues that it is entitled to a Social Security offset in the amount of \$126 per week. Last, respondent argues that it is entitled to a reimbursement for an overpayment of temporary total disability benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant is now 68 years old. He was born in Cuba and immigrated to the United States in 1993. That same year, he began working for respondent. In 1998, claimant underwent major abdominal surgery to repair a perforated appendix. In 1999, he suffered his first hernia. He underwent surgical repair, was off work for a period of time, and then returned to work. In June 2003, claimant suffered another hernia, which was repaired on July 9, 2003. Claimant again returned to work for respondent. He testified that when he came back to work after his surgery for the June 2003 hernia, he was placed in a job that required heavy lifting even though he had a lifting restriction. His condition worsened, and he developed a third hernia in April 2004. A third hernia repair surgery was performed on August 12, 2004. Claimant was released from treatment on November 4, 2004, as being at MMI.

Upon his release from treatment, claimant was told that respondent did not have any work for him because of his restrictions and told him to check back every Wednesday to see if a position had opened that would allow him to return to work. Claimant stated that he went to respondent several Wednesdays to check for work, but respondent never had any work for him. He was eventually told by respondent that because of his condition, he would not be able to return to work for respondent. His last day of work for respondent was July 28, 2004.

Claimant admits he has not looked for work anywhere since his termination from respondent. He states that he has constant pain in the right side of his stomach which hurts worse when he stands or sits for prolonged periods. He cannot bend over and says his wife has to tie his shoes for him. He has trouble sleeping and cannot eat a full meal without throwing up. He says he cannot even take care of himself and does not believe he could work at any job. Claimant is receiving Social Security benefits in the amount of \$546 per month, which he began receiving on January 3, 2003, before his work injuries in June 2003 and April 2004.

Dr. Pedro Murati is board certified in physical medicine and rehabilitation, electrodiagnosis, and independent medical evaluations. At the request of claimant's attorney, he examined claimant on two occasions, July 7, 2004, and January 17, 2005. When Dr. Murati first saw claimant on July 7, 2004, claimant's chief complaint was hernia pain. At the time, claimant had two previous hernia surgeries, one in 1999 and one in 2003. Dr. Murati diagnosed claimant with abdominal pain status post incisional hernia repair with umbilical hernia. Dr. Murati gave claimant a 10-pound lifting restriction and recommended a surgical evaluation for repair of the umbilical hernia.

Dr. Murati next saw claimant on January 17, 2005. Claimant's chief complaint was abdominal pain. Since claimant's last examination by Dr. Murati, he had another hernia repair surgery in August 2004 and had been released from treatment with restrictions. Upon examining claimant, Dr. Murati found that he had a decrease in sensation along the hypogastric nerve distribution bilaterally. Dr. Murati found claimant had a protuberance and weakness noted of the right upper quadrant of the abdomen. He noted an abdominal wall defect the size of a quarter. He testified that claimant is at risk for further hernias and that claimant's hernia surgeries were not successful.

When Dr. Murati examined claimant on July 7, 2004, claimant had an umbilical hernia which was subsequently repaired surgically by Dr. Hicks. He did not detect a hernia in the right upper quadrant of claimant's abdomen on July 7, 2004, so the hernia in the right upper quadrant of the abdomen would have been sustained by claimant after July 7, 2004, and before January 17, 2005. He also stated that the decrease in sensation on the hypogastric nerve distribution bilaterally he had found in the January 17, 2005, examination was not present at the July 7, 2004 examination.

Using the AMA *Guides*¹, Dr. Murati opined that claimant had a 3 percent whole person permanent partial disability based on the sensory loss of the hypogastric nerve distribution. Dr. Murati did not rate claimant's disability for the hernia, because by statute there is no rating for hernias. However, if he were to rate claimant's impairment for the hernia, the rating would fall in a range between 10 and 19 percent impairment to the body as a whole for a palpable defect in supportive structures of the abdomen wall. He would place claimant on the high end, or 19 percent.

Dr. Murati gave claimant permanent restrictions of no lifting, bending, crouching or stooping. Dr. Murati reviewed the task list partially prepared by Doug Lindahl with additions from the claimant. He opined that claimant was unable to perform 7 of the 10 tasks for a task loss of 70 percent.

Dr. Dick Geis is board certified in internal medicine, emergency room medicine, occupational medicine, and by the American Board of Independent Medical Examiners. He examined claimant on July 7, 2005, pursuant to an order of the ALJ.

Dr. Geis reviewed claimant's medical records and took a history of claimant's 1998 appendectomy and the three subsequent hernia surgeries. Claimant was still complaining of pain through his entire anterior abdomen, which he described as a burning, itching pain often with intestinal cramps and nausea. Upon examining claimant's abdomen, Dr. Geis found claimant had tenderness above, below and to the right of the umbilicus. He did not detect any inguinal hernia or inguinal tenderness. He did not find any inguinal sensory loss. Dr. Geis stated he did not know the specific cause of claimant's abdominal pain. He diagnosed claimant with ventral/incisional hernia times three, status post reduction/herniorrhaphy times three with chronic abdominal pain. He also said it was possible claimant had lower extremity claudication, which would not be related to his hernia surgeries.

Dr. Geis stated that claimant had failed hernia surgery because he continues to have symptoms after the surgical procedures. On cross-examination, Dr. Geis agreed that claimant's hernia surgeries were successful in that the abdominal contents were passed back through the wall and the tear in the wall was repaired. He admitted there was no evidence of a recurrent hernia at the time of his examination. He believes claimant had failed surgeries only because he continues to have post-operative pain. He did not find any evidence of disruption or injury to claimant's hypogastric nerve. He stated that claimant would be at risk for further hernias.

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Geis stated that claimant fit into Class 3 of the Classes of Hernia-Related Impairments of the *AMA Guides* based on his examination of claimant, claimant's recurrent and persistent pain, and the severe limitation of claimant's activities of daily living. Dr. Geis opined that claimant had a 30 percent whole person permanent partial impairment due to his work-related injuries.

In discussing his placing claimant in Class 3 under the *AMA Guides*, Dr. Geis found that of the three descriptors to help him decide which class is most appropriate for claimant, the first is that there is a palpable defect in the supporting structures of the abdominal wall. Dr. Geis agreed that he did not find that claimant had a palpable defect in the supporting structures of his abdominal wall. The second descriptor was that there is a persistent irreducible or irreparable protrusion at the site of the defect. Dr. Geis agreed this was not an accurate description of claimant's condition at the time of the examination. The final descriptor is limitation in normal activity, and Dr. Geis stated that claimant fit that description.

Dr. Geis gave claimant permanent restrictions of no repetitive bending, twisting, or lifting, a 10-pound weight limit, and a 20-pound push/pull limit. He said that claimant would not be able to lift 10 pounds on a repetitive basis and would limit that type of lifting to five pounds. He did not recommend that claimant walk on uneven ground or on an incline or go up and down stairs on a repetitive basis. Dr. Geis reviewed a task loss list prepared by Mr. Lindahl and opined that claimant was unable to perform four of the seven tasks for a task loss of 57 percent.

At the request of respondent, Dr. Chris Fevurly, who is board certified in internal medicine and preventative medicine with specialization in occupational medicine, examined claimant on December 1, 2005. Claimant complained of moderate discomfort along the abdomen which was aggravated by bending, stooping or heavy lifting. Cold weather aggravated his chronic abdominal discomfort. Claimant said he had problems falling asleep because of his discomfort, and he had some problems with constipation. Claimant appeared to be in acute distress while sitting but showed little difficulty with transfers from sitting to standing. He did need help getting up from supine to sitting.

Dr. Fevurly found that claimant's abdomen revealed a mid line surgical scar, which was generally tender. There was bulging of the abdomen with increased abdominal pressure. Dr. Fevurly did not feel a specific hernia in place, although it was clear that claimant had generalized weakness in the abdominal wall with protrusion of the abdomen when performing the Valsalva maneuver. Dr. Fevurly diagnosed claimant with abdominal wall/incisional hernia with residual chronic abdominal pain. He further stated: "It's difficult to say whether that's a true hernia, or not. It's—his wall is so thin that it protrudes visibly

when he exerts pressure.”² Dr. Fevurly said that claimant did not have a hernia at the time of his examination, “but his abdomen is so weak that he has an incompetent abdominal wall.”³ Dr. Fevurly found no hypogastric nerve dysfunction. Dr. Fevurly was not asked to perform an impairment assessment.

Dr. Fevurly recommended that claimant only lift up to five pounds on an occasional basis. Claimant should avoid prolonged or repetitive bending and stooping. He should not do forceful pushing or pulling. Dr. Fevurly said that in general, claimant could perform sedentary duties only. Dr. Fevurly reviewed a task list prepared by Steven Benjamin and opined that claimant was unable to perform 14 of the 18 tasks for a 78 percent task loss.

Doug Lindahl, a vocational rehabilitation counselor, met with claimant on January 20, 2005, at the request of claimant’s attorney. Together they prepared a work task list of seven tasks that claimant had performed from 1988 through 2004.

Mr. Lindahl noted that claimant was 66 years old at the time, had a 6th grade education, was non-English speaking, and was limited to a sedentary job. He opined that claimant would not be employable, stating that claimant’s biggest detriment to finding a job would be that a non-English speaking individual would need to perform certain physical activities in a job that would exceed his sedentary lifting limit. Mr. Lindahl testified he checked the Kansas Human Resources job link on February 15, 2005, and found no jobs available for which claimant would qualify. He admitted he did not conduct a labor market survey. Mr. Lindahl had no record of asking claimant about any job seeking activities, and claimant did not mention that he had been looking for a job.

A supplemental deposition of Mr. Lindahl was taken after he received a task report compiled by Steven Benjamin. After receipt of Mr. Benjamin’s task list, Mr. Lindahl met with claimant on February 20, 2006, and again reviewed the tasks he performed in the 15-year period before his injury. As a result of that meeting, Mr. Lindahl revised the task list adding several tasks. The revised task list had 19 tasks instead of the former 7. On the date of Mr. Lindahl’s supplemental deposition, he was contacted by claimant’s attorney and was told of one more task that claimant had performed while working for respondent. Mr. Lindahl again revised his list, adding that extra task. Mr. Lindahl admitted that he did not talk to claimant personally before adding this last task.

Mr. Lindahl believed that claimant had a 100 percent wage loss, stating that any earning ability he might have would not exceed the amount of Social Security benefits he was receiving.

² Fevurly Depo. at 12.

³ *Id.* at 15-16.

Steve Benjamin, a vocational rehabilitation consultant, met with claimant on January 6, 2006, at the request of respondent, at which time they compiled a list of tasks that claimant had performed in the 15 years before his injury. That list consisted of 18 unduplicated tasks.

Mr. Benjamin opined that claimant retains the ability to earn wages of between \$6 and \$8 per hour doing entry level or unskilled work. Using a preinjury average weekly wage of \$457.51, he computed that claimant's wage loss would be between 30 and 47.5 percent. Types of jobs he thought claimant could perform were cafeteria counter attendant, hand trimmer/polisher/assembler/mounter, electrical bench assembler, hand packager, hand presser, sewing machine operator, and waiter. He thought some of the positions claimant would be able to perform would also pay fringe benefits. In making this decision, Mr. Benjamin factored in claimant's physical restrictions, transferrable skills, and language restrictions. Mr. Benjamin admitted he had not conducted a labor market survey.

Mr. Benjamin asked claimant whether he had been looking for a job, and claimant told him that he had not applied for work. Claimant was not registered at the local Emporia Workforce Development Center.

Claimant agrees that his original injuries were hernias. He now claims he is suffering a new injury from his failed hernia repairs which has resulted in his being totally disabled.

The ALJ concluded that claimant's injuries were hernias and, therefore, were controlled by K.S.A. 44-510d(a)(22). The Board agrees. Unlike the claimant in *Lozano*,⁴ in this case neither Dr. Geis nor Dr. Fevurly found neurological injury resulted from the hernia surgeries. Furthermore, neither the condition diagnosed by Dr. Fevurly of an abnormally thin abdominal wall nor a "failed surgical hernia repair" removes these claims from the scheduled injury statute.

Accordingly, claimant is limited to medical treatment, past, future and unauthorized up to the statutory maximum, and temporary total disability compensation benefits. The ALJ's Award is affirmed. Per K.S.A. 44-534a(b), respondent may apply to the Director for reimbursement from the Workers Compensation Fund for any overpayment of temporary total disability compensation.

⁴ *Lozano v. Excel Corp.*, 32 Kan. App. 2d 191, 81 P.3d 447 (2003); see also *Busch v. Johnson's General Stores*, No. 78,158, unpublished Court of Appeals opinion filed September 18, 1998.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated October 11, 2006, is affirmed.

The Board notes that although the record contains the fee agreements between claimant and his attorney, the ALJ did not award claimant's counsel a fee for his services. K.S.A. 44-536(b) mandates that attorney fees for services rendered to claimant be reasonable as determined by the Director. Should claimant's counsel desire a fee for his services provided in this matter, then a request for the same should be presented to the ALJ.

IT IS SO ORDERED.

Dated this _____ day of January, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Gregory D. Worth, Attorney for Self-Insured Respondent
Brad E. Avery, Administrative Law Judge